

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

IN THE

Court of Appeals

DISTRICT OF COLUMBIA

October Term, 1913.

COURT OF APPEALS
DISTRICT OF COLUMBIA
FILED

NOV-5-1913

No. 2589.

Henry W. Hodges.
Clerk.

No. 15, Special Calendar.

JOHN FLAHERTY, Administrator of Lawrence Flaherty,
Deceased, *Appellant*,

VS.

WILLIAM F. COLUMBUS, Administrator d. b. n., c. t. a., of
Bridget Flaherty, Deceased.

REPLY BRIEF ON BEHALF OF APPELLANT

CHARLES W. DARR,
JULIUS I. PEYSER,
MILTON STRASBURGER.

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In his brief, Counsel for appellee takes occasion to criticise certain statements made in appellant's main brief (pp. 2, 3, 24), which, he says, erroneously imply that the business conducted by Michael Flaherty at the time of his death was sold before the first and final account was filed by the administratrix, and that said business was an asset of the estate. We do not claim that the business was sold before the filing by the administratrix of her first and final account and there is nothing in our main brief which would warrant such an

inference. The business was not sold until ~~February 28,~~ ^{May, 1911} 1907. But it makes no difference at what time the business was sold; it was an asset of the estate, and the administratrix should have been charged with its value.

It is contended on behalf of the appellee that the administratrix of the estate of Michael Flaherty is not accountable for the value of the business, upon the theory that a liquor license is not property, and therefore, is not a part of the estate of a decedent.

To sustain this contention would be to hold that a valuable business would, upon the death of the owner, be the property of nobody, and could be taken and appropriated to his own use by the first comer, without regard to the claims of the next of kin. It cannot be seriously urged that an executor or administrator is entitled to take and hold such business, use it for his own profit, and, upon sale of the same, pocket the proceeds thereof. It is far more in accord with sound reason to hold that the business, consisting of stock in trade, fixtures, lease, license and good will, pass to the personal representative as such, to be accounted for along with the other property of his decedent coming into his hands. Under the rules of the Excise Board a stated period of time is granted the personal representative within which to sell the business and cause the license to be transferred, thus recognizing the fact that the right to the license does not cease upon the death of the holder thereof. This view is not affected by the fact that it is within the discretion of the Excise Board to grant or to refuse its permission for such transfer. The license is property, subject to defeasance only by adverse action on the part of the authorities. There was no adverse action by the Excise Board in this case.

It is true that a liquor business cannot lawfully be conducted without a license, and if such license is revoked or withheld, its main value is gone. But because its value is liable to be depreciated, it does not follow that such busi-

ness is not to be appraised at its full value. The entire business came into the hands of the administratrix as one of the assets of her decedent's estate, but she has not accounted for the value of the same, with the exception of the stock in trade and fixtures, amounting to \$106.00. She has rendered no account of the good will and license, which constituted the most valuable parts of the business.

Counsel for the appellee cites the case of *Richards vs. Geiger*, 39 App. D. C., 278, to sustain his contention that the barroom business did not pass to the administratrix of Michael Flaherty as one of the assets of his estate. In that case, the executors of the licensee, without having obtained the consent of the Excise Board, as required by the Act of March 3, 1893 (27 Stat., 563), secured an order of the Court authorizing them to conduct said business. It was held that, as the law gave the Excise Board exclusive jurisdiction in the matter of the issuance and transfer of liquor licenses, the Probate Court was without jurisdiction in the matter, and that the license did not pass to the executors in the absence of the consent of the Excise Board.

But that case did not hold that a liquor business is not one of the assets of a decedent's estate.

The price at which the business was sold is the proper criterion by which to ascertain the amount for which the administratrix should account. She had the business transferred to herself in her own right, upon an ex parte application, without notice to and in fraud of the rights of the next of kin, and without giving him a chance to be heard before such transfer. Taking advantage of her position, she took possession of a valuable business, paying no consideration therefor. She therefore held the business as constructive trustee for the estate, and all increase in the value of the business, if any, would inure to the benefit of the estate.

Pomeroy, *Equity Jurisprudence*, Sec. 1052, and cases cited.

The only evidence produced before the Auditor as to the

value of the business was that offered by the appellant, namely, the price at which the business was eventually sold. Certainly, in the absence of any other evidence, this would be conclusive. Appellee offered no evidence whatever as to the value of the business, though the burden was properly upon him to enlighten the court as to the value.

On page 4 of appellee's brief, we find this statement :

"Thereupon the court appointed her, [Bridget Flaherty], as such administratrix, and, on November 16, 1905, authorized the transfer of the license to her in her own right, of all of which Lawrence Flaherty, as next of kin mentioned in her petition, then had *due notice*. (R. p. 6, 7.)"

The record shows that Bridget filed her petition for letters of administration on November 13, 1905 (p. 5) ; that, on November 14, 1905, an order was passed granting letters of administration to her (p. 6) ; that, on November 16, 1905, she moved the Court for authority to transfer the license to herself in her own right, and that, *on the same day*, upon an ex parte application, the Court authorized her to transfer said license to herself in her own right (p. 7).

As shown by the petition for letters of administration (R. p. 5) and the testimony in the case (R. p. 13), Lawrence Flaherty was a native of Ireland, and was at no time in America, so that it can hardly be said that he had due notice, as only three days had elapsed between the time of the filing of the widow's petition for letters of administration and the time of the granting of her petition for authority to transfer the license to herself. There is no evidence whatever that he was notified of her application for the transfer of license or of the granting of the order authorizing said transfer. The order having been obtained ex parte, and without notice, conferred no right whatever upon Mrs. Flaherty and did not have the effect of divesting the estate of an asset of large value.

On page 10 of his brief, Counsel for appellee says :

“* * * knowing that his father, his sole next of kin was not a citizen of the United States and was therefore ineligible to hold the barroom license, and bearing in mind that he had been remitting money to his people in Ireland, probably all his earnings, before his wife's money put him in business under the license in question, Michael accompanied his declarations by making a check to Bridget for what money he had in bank.”

If we are to assume that Michael Flaherty, on his death bed recalled the fact that his father, as an alien, was ineligible to hold the liquor license, it is as reasonable to suppose that he was also aware of the fact that said business was capable of being sold and converted into cash, of which Lawrence Flaherty could hold and possess his share. There is nothing in the record justifying the assertion of counsel that Michael Flaherty sent probably all his earnings to Ireland. On the contrary, it is not likely that Michael Flaherty, who, as pointed out in appellee's brief (p. 11) was anxious to go into business for himself, would depend upon the woman who was to become his wife to furnish his entire capital, while his own earnings went to his family. The testimony shows that Michael was turning his money over to Bridget before their marriage. (R. p. 22.)

Counsel states (p. 10) that joint tenancy and joint ownership as to chattels is recognized, and cites many cases. But no cases are cited, and no argument is made, tending in any wise to controvert the principles enunciated by the Auditor and referred to in our main brief, that it is necessary to the creation of a joint ownership that the property be taken in joint names ; that there is no joint ownership of a business ; and that because of the fact that joint ownership is not favored, the law to establish the same must be clear.

It is contended by counsel for appellee that Michael Flaherty acknowledged that the business belonged to his wife, although he had the license in his own name. If Michael was guilty of perjury and fraud in obtaining his license, his wife, being a party to his illegal acts, would not be allowed to take any benefit thereunder.

The law will not lend its support to a claim founded upon its violation.

Hall *vs.* Coppel, 74 U. S., 542.

As to the cases cited by counsel for appellee to show that in certain cases a trust will be imposed upon property purchased by the husband with the funds of the wife, it is sufficient to say that in all of them there was direct evidence of the acknowledgment by the husband of the wife's claim of ownership, and the finding of the court did not rest merely upon evidence of an acknowledgment by the husband that he had received money from his wife.

No foundation whatever appears for the theory of a constructive trust. There is no evidence of any fraud perpetrated by Michael Flaherty, actual or constructive, and fraud is an essential element to the creation of such a trust.

Pomeroy, Equity Jurisprudence, Sec. 1044.

Counsel for appellee seems to maintain that the validity of the alleged agreement between Michael Flaherty and his wife is governed by the law in force at the time of Michael's death, and not by the law in force at the time of the making of the alleged agreement. But the alleged contract, if there ever was such a contract, having been void when entered into, would not be validated by an alleged admission of an agreement, even if, at the time of the making of said admission, such a contract would have been valid.



It cannot be claimed that a contract was entered into at the time Michael was on his death bed, for there was then no present consideration to support such alleged contract.

And if the fanciful view of counsel for appellee (Brief, p. 10) be accepted, that Michael desired to justify the faith alleged to have been placed in him by his wife in that regard, and attempted to make a gift of all his property to her, such attempted gift would not be of legal effect because not accompanied by delivery.

Much is attempted to be made of the alleged making of a check by Michael Flaherty. If a check was made and delivered, why was it not put in evidence, or its non-production accounted for? There is no testimony as to the amount of the check, beyond that it was for a few hundred dollars (R. pp. 15, 16), whereas the deposit in bank amounted to more than two thousand dollars (R. p. 8).

The delivery of a check would not have constituted a valid gift of the fund in bank, unless it had been cashed before Michael Flaherty's decease, for it was revocable at any time before presentation, and in the absence of payment or presentation, the death of the drawer is *ipso facto* a revocation.

19 Encyclopedia of Law (2d ed.), 1031.

20 Cyc., 1206.

The fact that the amount in bank was included among the assets of the estate in Bridget Flaherty's petition for letters of administration (R. p. 5), and in her account (R. p. 8) shows conclusively that the money in bank constituted a part of the estate.

As all of the property in controversy in this case came into the hands of Bridget Flaherty in her representative capacity, if she or those claiming under her desire to establish a claim to more than her share under the statute of distribution, we submit that the burden of proof is upon such claimants to show by preponderance of the evidence that such claim should be allowed.

In the effort to obtain the estate of Michael Flaherty, the representatives of the widow have been compelled to shift their position time and again. In her petition for letters of administration Bridget Flaherty rested her claim on the theory that she was the survivor of a joint tenancy. Before the Auditor, a resulting trust was attempted to be established. The Court below did not consider the question of trusts, but placed its decision upon the ground of a contract supposed to have existed at the time of the purchase of the business. In appellee's brief, in attempting to uphold the decision of the lower court, he claims, in addition to the grounds theretofore relied upon, a constructive trust, a contract made by Michael Flaherty while on his death bed, and a gift from Michael Flaherty to his wife.

Respectfully submitted,

CHARLES W. DARR,
JULIUS I. PEYSER,
MILTON STRASBURGER.

COURT OF APPEALS
DISTRICT OF COLUMBIA
FILED

NOV-4--1913

IN THE

Henry W. Hodges.
Blunk.

Court of Appeals, District of Columbia

OCTOBER TERM, 1913.

No. 2,589.

No. 15, SPL. CAL.

JOHN FLAHERTY, ADMR., ETC., *Appellant,*

vs.

WILLIAM F. COLUMBUS ADMR., ETC.

ADDITION TO BRIEF ON BEHALF OF APPELLEE; being matter inadvertently omitted from original brief at V, p. 16.

V. IN CONCLUSION.

The fourth assignment of error is based upon the first exception to the account (Rec., 36, 8) and seeks to surcharge the accountant, Bridget Flaherty, Admix., with the alleged value of the business. This was an affirmative ex-

ception, but the exceptant wholly failed to sustain the burden of proof which was upon him. 18 Cyc., 1180, 1181.

Apart from that and the eleventh assignment of error, which relates to costs only, the only remaining question is whether or not Lawrence, as next of kin of his son Michael, the decedent, was entitled to one-half of the "Balance for distribution, \$2,696.80" (Rec., 8). The testimony fully sustains Bridget's claim, in her petition, that this balance comprised the earnings in the business which had been established and maintained with her money. It further appears upon the face of the account that it includes the money on deposit, in bank, \$2,637.57, which Michael, on his death-bed, said was hers and which he then turned over to her by his check mentioned in the testimony of Father O'Connell (Rec., 15, 16). The personal representative of a decedent cannot be charged in his account "with money or property which, although in decedent's possession at the time of his death, really belonged to the representative" (18 Cyc., 1136, 1137, citing 25 R. I., 361, 55 Atl., 881). As indicated in her petition (Rec., 5, 6) she included this sum in the assets, not for the benefit of Michael's father, but for the benefit of creditors and as an assurance to them that all funds under her control would be applied to the payment of their claims and so that no question could be raised as to the good faith of Michael and herself concerning their understanding that she was the real owner of the business and all the increment thereof.

LORENZO A. BAILEY,
Counsel for Appellee.

